Supreme Court, U.S.
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No. 85-1317

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor's in camera submission of documents to the district court for a determination whether they should be disclosed to the defense violated due process.

2. Whether the court of appeals applied an incorrect harmless error analysis in concluding that petitioner was not prejudiced by the exclusion of a document that, while not admitted into evidence, was quoted extensively at trial.

3. Whether the district court committed clear error in concluding that the prosecutor showed an adequate non-racial explanation for his use of peremptory challenges to strike four black potential jurors.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B9) is reported at 773 F.2d 136.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1985. A petition for rehearing was denied on December 5, 1985. The petition for a writ of certiorari was filed on February 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of nine counts charging wire fraud, in violation of 18 U.S.C. 1343, and one count of presenting false documents to a federally insured bank, in violation of 18 U.S.C. 1014. He

was sentenced to concurrent terms of 15 months' imprisonment on counts one through five, to be followed by five years' probation on the remaining counts, and he was also directed to make restitution of $5 million, subject to certain conditions. The court of appeals affirmed (Pet. App. B1-B9).[1]

The evidence at trial is briefly summarized in the court of appeals' opinion (Pet. App. B2). It showed that co-defendant Deborah Bell, a commodities broker, was the intermediary for a fraudulent sale of 6,000 tons of black beans from a supplier in Hong Kong to a Guatemalan government agency. Petitioner, Bell's attorney, participated in the charged fraud. Pursuant to the sales contract, the buyer arranged for a $5 million letter of credit, to be paid to Bell upon her submission of documents showing that the beans had been loaded on a vessel in Hong Kong. Bell submitted the required documents and obtained the funds. However, she and petitioner had forged the documents and no beans were in fact shipped to Guatemala.

ARGUMENT

The court of appeals' decision is correct. It does not conflict with any decision of this Court or any other court of appeals, and it does not present issues warranting this Court's review.

1. Petitioner first contends (Pet. 39-44) that the government violated his right to a fair trial by submitting "false or highly prejudicial information" (*id.* at 39) to the district court in camera. The court of appeals correctly rejected this claim.

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[1]Petitioner's co-defendants Deborah Bell and Michael Ball were similarly convicted on all ten counts, and their convictions were also affirmed on appeal. A petition filed by co-defendant Bell is currently pending before this Court (No. 85-976).

The facts surrounding this claim are set forth in the court of appeals' opinion (Pet. App. B8). Early in the trial, the government submitted to the district court, in camera, a report compiled by the Federal Bureau of Investigation concerning information supplied by a confidential source, James Gunnelles. Although the government believed that the material was inculpatory, it made the report available to the district court to allow the court to determine whether the report should be disclosed to the defense pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). See 2/24/83 Tr. 40. The district court concluded that the report was not discoverable and declared at sentencing that it "intend[ed] to ignore th[e] document in totality" and was "not going to credit [it] one wit [*sic*]." *Id.* at 17, 42-43.[2]

When a prosecutor has any doubt concerning the defendant's right to material under *Brady* or the Jencks Act, 18 U.S.C. 3500, courts have consistently recommended and approved the practice of submitting the material to the district court for an in camera determination whether it should be produced. See, *e.g.*, *United States* v. *Dupuy*, 760

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[2]Petitioner was also informed during the trial that other materials had been submitted in camera for the court's determination whether they should be disclosed to defense counsel. The court informed all parties that "if I err, it will be error on the side of disclosure" (Tr. 218). The court did not order the government to turn over all of the documents. After sentencing, the government disclosed or described the remaining documents that had been submitted in camera, including a letter from an Assistant United States Attorney to the trial judge "tendering grand jury materials with [the] government's theory of the case"; notification that a potential government witness had sat briefly on the grand jury that returned the indictment against petitioner and his co-defendants; notification of a closed investigation of a government witness for an alleged bad act unrelated to this case; and other information concerning an investigation into a government witness's work record and an alleged bad act that occurred 10 years before. Pet. App. A3-A4.

F.2d 1492, 1501 (9th Cir. 1985); *United States* v. *Darby*, 744 F.2d 1508, 1525 (11th Cir. 1984), cert. denied, No. 84-1260 (May 13, 1985); *United States* v. *Holmes*, 722 F.2d 37, 41 (4th Cir. 1983) ("[I]t would be the prosecutor's obligation to submit any material to the district court in camera if he had any doubts about whether it might be exculpatory."); see also *United States* v. *Agurs*, 427 U.S. at 106. Faced with a long and complicated trial, the prosecutor was justifiably desirous of avoiding inadvertent reversible error. Accordingly, as the court of appeals held, "the government acted prudently" in providing the material to the district court for its evaluation. Pet. App. B8. The court's rejection of petitioner's claim that the prosecutor acted improperly is unassailable and does not merit further review.

The decision below also correctly resolves petitioner's related suggestion (Pet. 43-44) that the in camera submission prejudiced the judge against him. The court of appeals characterized that as "a ridiculous suggestion" (Pet. App. B8), stating that "[w]e trust our judges to preside impartially over trials in which they know much that the jury does not know adverse to the defendants; there is no indication that the district judge failed to do his duty in this case" (*ibid.*). Indeed, petitioner has failed to identify any prejudicial rulings or conduct by the district court.

2. Petitioner next contends (Pet. 44-46) that the court of appeals erroneously applied the harmless error rule to reject his claim of prejudice from the exclusion of evidence at trial.

The facts relevant to this issue are recounted by the court of appeals (Pet. App. B5-B7). Irving Pheterson, a commodities broker in Miami who had a supplier in the Far East (*id.* at B2), was a key government witness against petitioner. Sometime prior to the trial, he wrote two draft letters to the prosecutor (*id.* at C1-C6, C6-C10) that the court of appeals described as "rambling, weird, but not demented" (Pet.

App. B5).[3] Petitioner sought to introduce one of the letters as substantive evidence in his own case to bolster his defense that Pheterson fabricated his testimony in exchange for immunity; the district court excluded the evidence on the ground that it was hearsay.[4]

The court of appeals concluded that the district court erred in excluding the evidence as hearsay. However, it observed that the letter, while not admitted as an exhibit at trial, was used extensively during cross-examination and that the letter did not establish that the witness's testimony was false. Pet. App. B6. The court noted that since the letter was effectively presented to impeach Pheterson's credibility at trial, the jury would not likely have reached a different verdict had it been given a copy of the letter during deliberations (*id.* at B6-B7). Accordingly, the court concluded that the trial court's evidentiary ruling was harmless.

Contrary to petitioner's assertions, the court's decision is wholly unremarkable. The court of appeals applied conventional and appropriate harmless error analysis.[5] It evaluated whether petitioner was prejudiced by the district court's error and concluded that, since the substance of the letter was made known at trial, reversal was unwarranted

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[3]Pheterson did not send the letters to the prosecutor and in fact objected when the prosecutor took them (Tr. 1039, 1282-1283).

[4]Although petitioner refers to both of the draft letters in his petition (Pet. 28-29) and includes both in his appendix (Pet. App. C1-C6, C6-C10), he offered only the first of the two letters at trial.

[5]Petitioner mistakenly asserts (Pet. 45-46) that the court of appeals' decision conflicts with *United States* v. *Marrero*, 486 F.2d 622, 627 (7th Cir. 1973), cert. denied, 423 U.S. 862. Even if an intra-circuit conflict exists, this Court does not sit to review such inconsistencies. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). Petitioner's suggestion (Pet. 44) that evidentiary rulings are not subject to harmless error review is frivolous.

(Pet. App. B6).[6] It considered the nature of the excluded evidence as well as other evidence that was introduced at trial and determined that the introduction of the letters would not have had any further evidentiary value (*id.* at B7). The court's analysis and conclusion are plainly correct.

3. Finally, petitioner contends (Pet. 31-38, 46-48) that the government's use of peremptory challenges to strike four black veniremen from the jury violated his right to an impartial jury. The propriety of a prosecutor's consideration of race in exercising peremptory challenges is currently pending before the Court in *Batson* v. *Kentucky*, No. 84-6263 (argued Dec. 12, 1985). However, there is no need to hold this petition for the decision in that case because there is here no factual basis for petitioner's claim.

In exercising seven peremptory challenges, the prosecutor struck the only four black veniremen on the jury panel. Defendants objected, asserting that the challenges were impermissibly used to exclude black persons. The prosecutor explained to the district judge in an ex parte in camera proceeding that he struck the veniremen on the basis of their education rather than their race.

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[6]Petitioner asserts (Pet. 29) that the letter demonstrates that Pheterson fabricated his trial testimony to satisfy the prosecutors. But as the court below correctly noted, Pheterson had given an outline of his evidence prior to being subpoenaed by the grand jury and, thus, before his need for immunity surfaced (Pet. App. B6). Moreover, the phrases in the letter to which petitioner refers are "consistent with Pheterson's simply having found it difficult to set forth the entire complicated story in a coherent form" (*ibid.*).

Petitioner also states (Pet. 25-26) that the court found that Pheterson was an "unreliable" witness and that "apart from Pheterson's testimony the evidence fell far short of proving petitioner's participation in the fraud beyond a reasonable doubt." However, the court also found that the testimony of other witnesses and petitioner's own conduct corroborated Pheterson's testimony (Pet. App. B4).

Because of the complicated nature of the charged fraud, the government believed that it needed well-educated jurors with business experience (Tr. 79-80). Of the four black jurors struck, only one apparently graduated from high school. In the prosecutor's opinion, however, that juror "did not appear to be particularly alert or interested" and "did not seem to have the natural capabilities that * * * are necessary" (*id.* at 79). Another struck juror had an eighth grade education and worked making brushes (*id.* at 34, 79-80); a third had attended high school but had no employment history (*id.* at 34); and a fourth apparently had some high-school level education and was self-employed in an unspecified job involving scrap metal recycling (*id.* at 54-55).[7] The prosecutor also noted that his three remaining challenges were similarly exercised to strike jurors who possessed only a high school education and lacked the business sophistication that the government deemed desirable in this case (*id.* at 79-80).

After considering this explanation, the district court concluded that race was not the criterion by which the peremptory challenges were exercised and that the government had an independent "strategic purpose" for its challenges (Tr. 81-82). The court of appeals accepted the district court's findings and affirmed (Pet. App. B9). The concurrent finding of fact by both courts below does not warrant review by

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[7]In describing this juror, petitioner states that he had "a high school education [and] had successfully operated his own small metal recycling business in the City of Chicago for 25 years" (Pet. 34). However, the juror simply stated during voir dire that he had "a high school equivalent" and did not describe his self-employment in scrap metal recycling, much less characterize his endeavors as "successful."

this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, No. 83-1007 (Jan. 9, 1985), slip op. 7-8 n.5.[8]

In sum, it is unnecessary to hold this petition pending resolution of *Batson* v. *Kentucky*.[9]

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[8]Petitioner's accusation that the government's explanation was pretextual and that the jury selection process was racially motivated finds no support in the record. The profile of the jurors selected validates the government's explanation that it sought a jury comprised of well-educated persons with significant work experience. Of the jurors and alternates accepted by the government, four had college or post-graduate degrees; five had attended or were presently attending college; four had completed high school and had substantial or responsible employment. Only one alternate juror had less than a high-school education. She had completed three and one half years of high school, but her lack of a high school diploma was compensated for by her secretarial skills and work experience. See Answer of the United States to Petition for Rehearing with Suggestion of Rehearing en Banc 4-5.

Petitioner also contends (Pet. 48) that the ex parte nature of the proceeding at which the prosecutor explained the reasons underlying his decisions on his peremptory challenges "smacks more of star chamber, than any approved form of American jurisprudence." However, "as things now stand, a prosecutor need not defend his peremptory challenges." *United States ex rel. Teague* v. *Lane*, 779 F.2d 1332, 1333 (7th Cir. 1985) (Cudahy, J., dissenting from the order granting rehearing en banc). See also, *e.g.*, *Swain* v. *Alabama*, 380 U.S. 202, 220-222 (1965); *United States* v. *Leslie*, 783 F.2d 541, n.33 (5th Cir. 1986) (en banc); *Weathersby* v. *Morris*, 708 F.2d 1493 (9th Cir. 1983). Since the government was not required to give an explanation to the court at all, its offer to do so ex parte and in camera did not deprive petitioner of any benefit to which he was otherwise entitled.

[9]We note that the court of appeals recently granted rehearing en banc in *United States ex rel. Teague* v. *Lane*, *supra*, to determine "whether the Constitution prohibits prosecutors from using their peremptory challenges to exclude potential jurors exclusively on the basis of race" (Pet. App. D2). However, the court of appeals denied rehearing en banc in this case only one month before. The court of appeals presumably denied rehearing en banc in this case based on the panel's affirmance of the district court's factual determination that the prosecutor's use of peremptory challenges was not racially motivated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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